A

PP v. KUMAR AMIR

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
RHODZARIAH BUJANG JCA
KAMALUDIN MD SAID JCA
B [CRIMINAL APPEAL NO: Q-05(LB)-203-04-2018]
8 OCTOBER 2018

C ***CRIMINAL PROCEDURE:*** *Prosecution – Gap in evidence – Charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 – Discrepancies in weight of drug exhibit as stated by customs officer and chemist – Whether sufficient explanation given for discrepancies – Whether created serious gap in evidence – Whether led to reasonable doubt as to identity of drug exhibits*

D ***EVIDENCE:*** *Exhibits – Break in chain of evidence – Charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 – Discrepancies in weight of drug exhibit as stated by customs officer and chemist – Whether sufficient explanation given for discrepancies – Whether created serious gap in evidence – Whether led to reasonable doubt as to identity of drug exhibits*

E The Assistant Superintendent of Customs saw a suspicious image on the screen of the scanner machine whilst scanning the luggage of passengers of a flight from Singapore and reported it to the Shift Supervisor ('PW7'). The luggage belonged to the respondent, an Indian national. Upon checking, a 'package of brown paper box' was recovered and crystallised substance suspected to be dangerous drugs were found concealed inside it. A test on the crystallised substance using 'Trunarc' test kit showed that it was methamphetamine.
F PW7 thereafter arrested the respondent and lodged a police report regarding the arrest. Another search was conducted at the Customs Narcotic Branch office, during which photographs of the exhibits were taken and a search list was prepared. The respondent was thereafter charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s. 39B(2)
G of the same Act. The respondent, in his submission at the close of the prosecution case, raised various gaps and material discrepancies in the evidence that had resulted in the break of the chain of custody of the drugs purportedly seized from the respondent and sent to the chemist for testing. He further submitted that the Trunarc test conducted by the prosecution
H ought to be rejected. The High Court, at the end of the prosecution case, discharged and acquitted the respondent on the grounds that the prosecution had failed to prove a *prima facie* case on the charge preferred against the respondent. Hence, the prosecution appealed.

I

Held (dismissing appeal)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The discrepancy, as to the weight of the impugned drugs as stated in the 'fakta kes' ('exh. P1(d)') with the weight stated by the chemist in her chemist report ('PW4'), were never explained. Exhibit P1(d) was signed on behalf of PW7 by PW8. PW7 confirmed that P1(d) was not signed by her and was not prepared by PW8. No evidence or explanation was ever given by PW7, PW8 or any of the prosecution witnesses on the weight as stated in P1(d). Neither was evidence adduced through any of the prosecution witnesses as to which part of the prosecution case or narrative did the weighing of the impugned drugs by the unknown officer fitted in. This had created a serious gap in evidence. (paras 25-27)

(2) Exhibit P1(d), which was the annexure to Borang Kimia 14 sent to the chemist, other than stating the gross weight of the impugned drugs found in the respondent's bag as 1,944g, also stated that a police report had been made relating to the arrest. The police report by PW7 stated, *inter alia*, that the bag was found to contain the crystallised substance suspected to be dangerous drugs, *ie*, methamphetamine. Even if the prosecution's argument that the identity of the drugs was the same as the one seized by PW7 could be accepted, it was still doubtful how the weight of the drugs as stated 1,811g appeared in the chemist report when exh. P1(d) stated the weight was 1,944g. In the absence of any explanation, the discrepancies led to a reasonable doubt as to the identity of the drugs exhibits which formed the subject matter of the charge against the respondent. (paras 28 & 33)

(3) Further, there was doubt as to the identity of the impugned drugs based on the conduct of the Trunarc test. The omission in producing the photographs in the memory card was a clear suppression and withholding of evidence. The photograph that was not produced by the prosecution included the photograph showing the Trunarc test kit. The Trunarc test was conducted by the custom officer, Pik Timothy Jackie, on the impugned drugs purportedly recovered from the respondent but he was never called by the prosecution to explain the discrepancy. Hence, an adverse inference under s. 114(g) should have been invoked against the prosecution. In the circumstances, the findings of the trial judge on this issue were justified and there was no reason to disturb the findings. (paras 36-39)

Bahasa Malaysia *Headnotes*

Penolong Superintenden Kastam terlihat satu imej mencurigakan pada skrin mesin pengimbas semasa mengimbas bagasi penumpang-penumpang pesawat dari Singapura dan melaporkannya kepada Penyelia Shif ('PW7'). Bagasi itu milik responden, seorang warga India. Setelah diperiksa, 'bungkusan kotak kertas berwarna perang' ditemui dan bahan berkristal disyaki dadah berbahaya didapati disembunyikan di dalamnya. Ujian terhadap bahan berkristal menggunakan alat ujian 'Trunarc' menunjukkan bahan itu ialah methamphetamine. PW7 kemudiannya menangkap responden dan membuat laporan polis mengenai tangkapan itu. Satu lagi pencarian dibuat di pejabat Bahagian Narkotik Kastam, dan ketika itu gambar-gambar ekshibit diambil dan senarai carian disediakan. Responden, kemudiannya, dipertuduh dengan satu kesalahan bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952, yang boleh dihukum bawah s. 39B(2) Akta sama. Responden, dalam penghujahannya pada penutup kes pendakwaan, membangkitkan berbagai kelompangan dan percanggahan penting dalam keterangan yang mengakibatkan pemutusan dalam rantaian jagaan dadah yang dikatakan dirampas daripada responden dan dihantar kepada ahli kimia untuk ujian. Selanjutnya, responden menghujahkan bahawa ujian Trunarc oleh pihak pendakwaan wajar ditolak. Mahkamah Tinggi, di akhir kes pendakwaan, melepaskan dan membebaskan reponden atas alasan-alasan bahawa pihak pendakwaan gagal membuktikan kes *prima facie* atas pertuduhan yang dikenakan terhadap responden. Oleh itu, pihak pendakwaan merayu.

Diputuskan (menolak rayuan)
Oleh Kamaludin Md Said HMR menyampaikan penghakiman mahkamah:

(1) Percanggahan berkaitan berat dadah tersebut, seperti yang dinyatakan dalam fakta kes ('eks P1(d)'), dengan berat yang dinyatakan oleh ahli kimia dalam laporan kimianya, tidak pernah dijelaskan. Ekshibit P1(d) ditandatangani oleh PW8 untuk pihak PW7. PW7 mengesahkan bahawa eks. P1(d) tidak ditandatangani olehnya dan tidak disediakan oleh PW8. Tiada keterangan atau penjelasan diberikan oleh PW7, PW8 atau mana-mana saksi pendakwaan tentang berat yang dinyatakan dalam eks. P1(d). Malahan, tiada keterangan dikemukakan oleh mana-mana saksi pendakwaan tentang bahagian kes atau naratif pihak pendakwaan mana yang menjadikan penimbangan berat dadah tersebut, oleh pegawai yang tidak dikenali, sesuai. Ini menimbulkan kelompangan serius dalam keterangan.

(2) Ekshibit P1(d), yang adalah lampiran pada Borang Kimia 14 yang dihantar kepada ahli kimia, selain menyatakan berat kasar dadah tersebut yang ditemui dalam beg responden sejumlah 1,944g, juga menyatakan bahawa laporan polis dibuat berkaitan penangkapan itu.

Laporan polis oleh PW7 menyatakan, antara lain, beg tersebut didapati mengandungi bahan berkristal disyaki dadah berbahaya, iaitu, methamphetamine. Walaupun hujahan pihak pendakwaan bahawa identiti dadah itu sama dengan yang dirampas PW7 boleh diterima, masih diragui bagaimana berat dadah boleh dinyatakan 1,811g dalam laporan kimia apabila eks. P1(d) menyatakan beratnya 1,944g. Tanpa apa-apa penjelasan, percanggahan itu menjurus pada keraguan munasabah tentang identiti ekshibit dadah yang membentuk perkara pertuduhan terhadap responden.

(3) Selanjutnya, terdapat keraguan tentang identiti dadah itu berdasarkan ujian Trunarc yang dijalankan. Ketinggalan mengemukakan gambar-gambar dalam kad memori jelas adalah penahanan atau penyekatan keterangan. Gambar-gambar itu tidak dikemukakan oleh pihak pendakwaan termasuk gambar menunjukkan alat ujian Trunarc. Ujian Trunarc dijalankan oleh pegawai kastam, Pik Timothy Jackie, terhadap dadah itu yang dikatakan didapati daripada responden tetapi dia tidak dipanggil oleh pihak pendakwaan untuk menjelaskan percanggahan. Oleh itu, inferens bertentangan bawah s. 114(g) sewajarnya dibangkitkan terhadap pihak pendakwaan. Dalam keadaan itu, dapatan-dapatan hakim bicara dalam isu ini berjustifikasi dan tiada alasan untuk mengganggu dapatan itu.

Case(s) referred to:

Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC ***(refd)***
Lim Pah Soon v. PP [2013] 8 CLJ 800 CA ***(refd)***
Loh Kah Loon v. PP [2011] 5 CLJ 345 FC ***(refd)***
Mazlan Mustaffa lwn. PP & Kes-Kes Yang Lain [2015] 1 LNS 192 CA ***(refd)***
Ooi Choo Hock v. PP [2014] 3 CLJ 239 CA ***(refd)***
PP lwn. Bazleh Saeid Salleh & Satu Lagi [2014] 6 CLJ 979 CA ***(refd)***
Tan Yew Choy v. PP [2009] 4 CLJ 245 FC ***(refd)***
Yusri Pialmi v. PP [2010] 6 CLJ 878 FC ***(refd)***
Zaifull Muhammad v. PP & Another Appeal [2013] 2 CLJ 383 FC ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, s. 39B(1)(a), (2)
Evidence Act 1950, s. 114(g)

For the prosecution - Mohd Zain Ibrahim; DPP
For the respondent - Satinder Singh Sandhu & M Isayyem Azim; M/s Sandhu & Co Advocs

[Editor's note: Appeal from High Court, Kuching; Criminal Trial No: KCH-45A-6/5-2017 (affirmed).]

Reported by S Barathi

A

JUDGMENT

Kamaludin Md Said JCA:

Introduction

B **[1]** The respondent, an Indian national (Passport No. Z401013) was charged and tried in the High Court at Kuching, Sarawak with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s. 39B(2) of the same Act. The charge reads:

C

> That you, on 23rd of April 2017, at about 9.15 pm at the office of Unit Khas Pemeriksaan Penumpang, Royal Malaysian Customs Department, Kuching International Airport Arrival Hall, in the District of Kuching, in the State of Sarawak, was knowingly trafficking in dangerous drugs, *to wit*, 933grams of 20 Methamphetamine, and thereby committed an offence under Section 39B(1)(a) of the Dangerous Drugs Act, 1952 punishable under Section 39B(2) of the same Act.

D

[2] The respondent pleaded not guilty and claimed trial.

[3] The prosecution had called eight witnesses. At the end of the prosecution case, the respondent was discharged and acquitted by the High Court Judge ('learned judge').

E

[4] Aggrieved with the decision of the learned judge, the prosecution ie, the appellant appealed to this court. We heard the appeal on 16 October 2018 and after hearing the parties, we unanimously dismissed the prosecution's appeal. We now furnish our reasons in dismissing the prosecution's appeal.

F **The Prosecution Case**

[5] SP5 ie, the Assistant Superintendent of Customs was scanning the luggage of the passengers of flight SILKAIR M1378 arriving from Singapore, at about 2115 hours when he saw a suspicious image on the screen of the scanner machine and reported to the Shift Supervisor (PW7). Thereafter he
G saw a male Indian passenger carrying a purple luggage bag being led from the scanner machine to the examination counter by PW7 for physical checking. PW6, ie, the Assistant Superintendent who was stationed at the examination counter confirmed the male Indian passenger came to her counter carrying a purple luggage bag and observed the brand was "FLIGHTWAY", the bag
H was locked with a gold colour padlock and there was a tag attached to the bag. PW6 then asked the respondent to open the luggage to check the content. Upon checking, PW6 saw new clothings and underneath those clothings were several packages of "kain pasang sulam". She picked up one of the "kain pasang sulam" and found that it was rather heavy. She opened the package
I to remove the cloth from inside, unfolded it and found a suspicious "package of brown paper box" inside the cloth. She immediately informed PW7 and PW7 instructed her to escort the respondent to the UKKP for further inspection.

[6] On 23 April 2017 at around 2300 hours, the narcotic team arrived at the Customs Office at Kuching International Airport. During the neat search ie, 100% search, PW7 opened the brown paper packet and found crystallised substance suspected to be dangerous drugs concealed inside. When the respondent was asked what was the crystallised substance that he brought to Kuching, he replied "tea sugar". When a test was conducted on the crystallised substance by using the "TruNarc" test kit, the test result showed it was methamphetamine. PW7 showed the result to the respondent and placed the respondent under arrest and informed him of the reason for his arrest. She administered the s. 37A caution to the respondent who replied "yes" and nodded his head.

[7] PW7 then lodged a police report on 24 April 2017 regarding the arrest and together with the respondent who carried the luggage bag and some customs officers proceeded back to the Customs Narcotic Branch Office for another neat search. At about 0145 hours, PW8 carried the neat search with the assistance of PW3 who took photographs of the exhibits during the search. The search list was prepared in the presence of the respondent. The neat search was completed at 1430 hours.

[8] During the trial, the prosecution called eight witnesses to give evidence and all exhibits pertaining to the case were tendered in court and marked as court exhibits. With those available evidence before the court, the prosecution submitted that the following essentials ingredients of a charge under s. 39B of the Act 1952 in the present case had been fulfilled:

(a) that the drugs seized was in the possession of the respondent;

(b) that the drugs seized was listed in the Schedule of the Act 1952; and

(c) that the respondent trafficked 933g of methamphetamine.

Respondent's Submission

[9] The submission of the learned counsel for the respondent at the close of prosecution case was that the prosecution had failed to discharge the burden to establish that there is no break in chain of evidence on the custody of the subject drugs. The counsel for the respondent in his submission raised various gaps and material discrepancies in the evidence adduced by the prosecution that has resulted in the break in the chain in the custody of the drugs purportedly seized from the respondent and sent to the chemist for testing. He submitted that this break in chain of evidence was in respect of the custody of exhs. P18 (the purple luggage bag), the custody of the drugs with PW7, PW8 and PW2 and different weights of the drugs. In addition, he submitted that the "TruNarc" test conducted by the prosecution ought to be rejected.

[10] The full submission of the break in the chain in the custody of the drugs by the learned counsel can be found in the learned judge grounds of judgment which the learned judge had considered (See pp. 13 to 39 of the record of appeal vol. 1).

Finding Of The High Court

[11] Having heard and considered the evidence of the prosecution's witnesses, the documentary evidence of the marked exhibits and also the submissions of the prosecution and the learned counsel of the respondent, the learned judge made a finding that the prosecution had failed to prove a *prima facie* case on the charge preferred against the respondent. Accordingly, the learned judge discharged and acquitted the respondent without calling upon him to enter his defence.

The Prosecution Appeal

[12] The prosecution listed six grounds of appeal that the learned judge had erred in law and in fact in his decision as found in their petition of appeal. During the oral submission, the learned Deputy Public Prosecutor (learned DPP) informed us that there is only one issue or ground to be submitted ie, whether the learned judge was right in giving an order to discharge and acquit to the respondent due to the discrepancy in the evidence by the prosecution relating to the weight of the drugs.

[13] The learned DPP did not agree with the learned judge's view that the discrepancy in the weight of the drugs as found by the unknown officer and the weight obtained by the chemist has cast a serious doubt on the identity of the drugs seized. It was the prosecution's case that the learned judge failed to take into consideration that there is no discrepancy at all for the following reasons:

(a) the weight of 1,944g, as shown in exh. P1(d), was for the gross weight of all the packages (eight brown packages) which contained crystalline substance; and

(b) the weight of the 1,811g, as shown in exh. P4, is the net weight for the crystalline substance.

[14] The prosecution and the respondent had filed their written submissions. The learned DPP referred to para. 15 of his written submission which says as follows:

> [15] Her ladyship was wrong when her ladyship decided that at paragraph 81-83, at page 39-39 ROA Vol 1:
>
> 81. It is to be noted that based on the "fakta kes' annexed to Form (KIMIA 14) [Exhibit P1(d)], it is stated "Setelah ditimbang berat kasar keseluruhan adalah dalam anggaran seberat 1944grams." PW1 stated in the Chemist Report [Exhibit P4] that the net weight of the

drug was 1,811 grams which contained 933 grams Methamphetamine. As noted, PW1 did not testify as the gross weight of the seized drugs handed over to her analysis.

82. Learned counsel for the Accused submitted that there was a gap in the evidence in that the prosecution has not adduced evidence as to who weight the drugs; how the weight of 1944 grams was derived or obtained by the unnamed officer of the Customs Department and no gross weight obtained by PW1. There is no explanation from the prosecution witnesses as to the difference in the weight obtained by the unnamed officer of the Customs Department and the weight obtained by the chemist, citing *Tan Yew Choy v. Public Prosecutor* [2009] 4 CLJ 245.

83. On the authority of *Tan Yew Choy, supra* it is my view that the discrepancy in the weight of the drugs as found by the unknown custom officer and the weight obtained by the chemist has cast a serious doubt on the identity of the drugs seized.

[15] The learned DPP submitted that the weight of 1,944g was immaterial due to the fact that the prosecution's witness had positively identified the exhibits as the same exhibit sent to the chemist. The gross weight of 1,944g in P1(d) was only relevant facts and not as to the facts of the case. The fact of the case which was relevant is 993g of methamphetamine stated in P4 (chemist report). This has been proved by the prosecution, and thus defence must be called. Therefore, based on the testimony of all prosecution's witnesses called for the present case, it is left with no doubt that the chain of evidence of the drugs found intact up to the point when the said drugs were tendered to this court as case exhibits.

[16] We heard the explanation about the exhibits in particular eight packets of crystalline substance exhibits and which were marked by PW7 and later on were handed over by PW7 to the investigating officer (PW8) at 5am on 24 April 2017. PW8 upon receipt the said exhibits, put down his signature on the said exhibits. All exhibits have been kept properly in the strong room by PW2 until 28 April 2017 when it was taken out by PW8 to be sent to the Chemistry Department. The eight packets of crystalline substance were properly put in eight brown coloured envelopes and marked the envelopes from 82-89 respectively and put all the envelopes inside a box that he marked as "S" (exh. P2) and thereafter he sealed P2 with Royal Malaysian Customs Department seal. On the same day, he sent P2 to Chemistry Department for chemical analysis where the exhibit was received by the chemist (PW1). The exhibits after analysis were sealed inside its original box with safe label and laboratory number of Malaysian Chemist Department. The box marked "S" was identified by PW8 and also PW1 during their testimony. Exhibit P2 was then handed over by PW1 to PW8 on 30 May 2017 and on the same day of receipt PW8 sent P2 to the storekeeper for safekeeping. Exhibit P2 was kept in the store until the trial started.

[17] The learned DPP submitted that the evidence of PW1 when she observed the condition of P2 during her testimony is relevant, where she confirmed that the safety labels of Malaysian Chemistry Department were in a good condition and remained untouched. It was further submitted that PW1, PW7 and PW8 had positively identified the exhibits. Therefore, from the evidence of witnesses involved with the handling of case exhibits, the learned DPP submitted that from the moment the substance was found up to the point that all exhibits were tendered as evidence in court, there was no break in chain of handling exhibits. The exhibits that were adduced in court by PW1 are the same as the one that were marked and handled by both PW7 and PW8.

[18] The learned DPP relied on the case of *Loh Kah Loon v. Public Prosecutor* [2011] 5 CLJ 345; [2011] 4 MLJ 260 where the court upheld the decision of the courts below even though there existed a discrepancy in the weight of the drug exhibit as found by the police and the chemist. In that case, the High Court as well as the Court of Appeal found it as a fact that there was no doubt in the identity of the drug exhibits because the evidence before the court showed there was no break in the chain of evidence. The movement of exhibits was clearly explained, and the markings on the drug exhibits were positively identified by witnesses. The court below were satisfied that the drug exhibits that were seized from the appellant were the same exhibits produced in the High Court.

[19] The cases of *Mazlan Mustaffa lwn. PP & Kes-Kes Yang Lain* [2015] 1 LNS 192; [2015] MLJU 2127 and *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945; [2013] 6 MLJ 636 were also referred. The courts in these cases had held that there was no doubt that the drug exhibits seized from the appellant and as examined by the chemist were the same drugs exhibits that the appellant was charged with. There was no break in the chain of evidence and the drug exhibits were positively identified by the prosecution witnesses.

[20] It was further submitted that all the witnesses are credible and trustworthy witnesses. During the proceeding, there is no direct or circumstantial evidence shown that the bag was tampered with. The respondent also never denied and complained to PW6 and PW7 that the bag was tampered with the first time he was asked to open the bag. Therefore, the court must accept their evidence.

[21] The learned DPP submitted that the evidence of the chemist PW1 is to be accepted on its face value as there was no evidence to show that the testimony of PW1 was inherently incredible nor was there any other expert that was called to testify on the same drugs exhibit. Overall, the prosecution's case is that there is no such discrepancy in the evidence of the weight of drugs.

[22] It was the prosecution's case that the authority of *Tan Yew Choy v. PP* [2009] 4 CLJ 245 which the learned judge had cited and an authority for her to have found that there existed discrepancy in the evidence of the weight of drugs must be distinguished with the present case. According to the learned DPP, in *Tan Yew Choy v. PP (supra)*, the serious doubt affecting the identity of the drugs happened when there was an increased in the total gross weight by the time the drugs reached the hands of the chemist whereas in the present case, there is no such evidence to show such discrepancies that will affect the identity of the drugs. If this court were to see the gross weight in "fakta kes" as per P1(d) more (1,944g) than in P4 (1,811g) that was testified by the chemist (PW1) is not material. In fact, the dominant matter here, which the learned judge did not take into consideration, is that the prosecution had established the drugs weight of 993g of methamphetamine as per charge.

[23] The learned DPP heavily relied on the authority of *Loh Kah Loon v. Public Prosecutor (supra*) and submitted that had the learned trial judge directed her mind to the chain of evidence she would have come to a finding that the prosecution has proved that there were no gaps in the chain of evidence and also adduced sufficient evidence that the drug exhibits which was recovered from the respondent were the same drug he was charged with. Further, the learned DPP submitted that the learned judge had misdirected herself on the issue of identity of exhibits seized which finally had affected her judicial mind in evaluating the elements to be proved by the prosecution. The learned judge should have come to the finding that the prosecution had proved a *prima facie* case against the respondent and called for his defence to the charge of trafficking. Therefore, this is the right case for this court to intervene and reverse the finding.

Our Deliberation And Decision

[24] Having read the record of appeal and heard the submissions of the learned DPP and counsel for the respondent and the grounds of decision of the learned judge, we did not think that the learned judge had committed an error in her finding that there is no explanation from the prosecution's witnesses as to the difference in the weight obtained by the unnamed officer in the Customs Department and the weight obtained by the chemist, citing *Tan Yew Choy v. Public Prosecutor (supra)*.

[25] The discrepancy in this case relates to the weight of the impugned drugs as stated in the "Fakta Kes" (exh. P1(d) with the weight as stated by the chemist, PW1 in her chemist report (exh. P4):

(i) In the fakta kes (P1(d)), the weight of the impugned drugs is stated as follows:

> "setelah ditimbang berat kasar keseluruhan adalah dalam anggaran seberat 1944 gram"

(ii) The chemist, PW1 in her report (P4) states the weight of the impugned drugs as follows:

> … saya mendapati berat bersih bahan-bahan tersebut ialah 1,811 gram yang mengandungi 933 gram Methamphetamine.

[26] Fakta kes (P1(d)) is the annexure of Borang Kimia 14 (exh. P1(a-d). Fakta kes P1(d) was signed on behalf of Siti Rahmah binti September (PW7) by Tan Sing Chai (PW8). PW7 confirmed that fakta kes (P1(d) was not signed by her and P1(d) is not prepared by PW8. PW8 confirmed that he signed it (see: pp. 279 to 280 and p. 332 of the record of appeal vol. 2(2)). In the record of appeal, we noted that there is no evidence at all adduced by the prosecution on the contents of the fakta kes (P1(d), in particular on the weight of 1944g which appears only in the fakta kes (P1(d)). In fact, when PW7 was cross-examined on the weight as stated in P1(d), she confirmed that nothing was mentioned in her witness statement (WSPW7), borang penyerahan kes (P40) and senarai bongkar lampiran B (P41) to show that she had taken the weight of the impugned drugs. (see: pp. 276-277 of the record of appeal, vol. 2(2)).

[27] Based on the evidence, we agreed with the respondent that no evidence or explanation was ever given by PW7, PW8 or any of the prosecution witnesses on the weight as stated in the fakta kes (P1(d), in particular on how the weight 1,944g as stated in P1(d) was obtained, which officer weighed it, when was it weighed and what actually constitutes "berat kasar keseluruhan dalam anggaran 1,944g" as stated in the said P1(d). We agreed that the situation may give rise to a valid question on what happened during the period of which the weight of the impugned drugs as stated in P1(d) was taken by the unknown custom officer. This would remain unexplained and surely in our view had created a gap in the chain of evidence. No evidence was also adduced through any of the prosecution's witnesses as to which part of the prosecution case or narrative does the weighing of the impugned drugs by the unknown officer fits in and this had created a serious gap in the evidence. In short, the discrepancy as to the weights as stated in the said P1(d) and the chemist report P4 were never explained.

[28] The respondent had submitted that PW1 who prepared the chemist report (P4) did not state anywhere in her evidence to confirm the weight of the drugs which were sent to her for analysis was the same with the weight of the impugned drugs as stated in the fakta kes (P1(d)). PW1 only confirmed that she had taken the gross weight of the brown package but no evidence on the said gross weight was however mentioned in her witness statement (WSPW1) (see: pp. 39 to 40 of the record of appeal vol. 2(1) and pp. 24 to 25 of the record of appeal vol. 3). We also noted that in the fakta kes (P1(d)) which is the annexure to borang kimia 14 which was sent to the chemist (PW1) other than stated the gross weight of the impugned drugs as 1,944g

which was found in the respondent's bag, it also stated that a police report (P39) had been made relating to the arrest. The police report by PW7 stated that the respondent was detained on 23 April 2017 and upon examination on his bag, she found the bag contained the crystallised substance suspected to be dangerous drugs ie, methamphetamine. Even if, the prosecution argument that the identity of the drugs is the same as the one seized by PW7 can be accepted, however, it is still doubtful how the weight of the drugs as stated 1,811g appears in the chemist report P4 when the fakta kes (P1(d)) which was sent to the chemist for analysis stated the weight of the drugs is 1,944g. The chemist PW1 in her report P4 later found the crystal substance contained 933g methamphetamine which is the subject matter of the charge.

[29] In *Tan Yew Choy v. PP (supra)*, Zulkefli Makinuddin FCJ, said at p. 251 as follows:

> We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist (PW3), the total weight of the cannabis is 224.65 grams. The weight of 224.65 grams is obtained by adding the weight of the cannabis placed on the newspaper which is 151.08 grams and the cannabis from the 40 plastic packets which is 73.57 grams. However, exh. P15 (Borang Serah Menyerah) stated that the weight of the cannabis to be 140 grams (on the newspaper) and 65 grams (in the 40 packets) making the total gross weight to be 205 grams. This would mean that by the time the cannabis reached the hands of the chemist, the cannabis has increased in weight by 19.65 grams.

[30] The above case is similar with the facts in the present case. There is no explanation how the weight of the impugned drugs of 1,811g as stated in P4 is derived from when the fakta kes (P1(d)) stated the weight of the impugned drugs is 1,944g bearing in mind the eight packets of crystal substance which was put in eight envelopes inside a box marked as "S" (P2) was sent to Chemistry Department for chemical analysis and the exhibit was received by the chemist PW1.

[31] In the case of *Lim Pah Soon v. PP* [2013] 8 CLJ 800, Azahar Mohamed JCA (as he then was) held as follows:

> (3) The dangerous drugs itself constituted the very *corpus delicti* of the offence and in sustaining a conviction under s. 39B(2) of the Act, the identity and integrity of the *corpus delicti* must be established beyond reasonable doubt. *Where there is a material discrepancy in the weight of the drug exhibit as found by the police and the chemist, it is incumbent on the prosecution to explain such discrepancy satisfactorily. The absence of a reasonable explanation would give rise to a reasonable doubt on the identity of the drugs exhibits.* Further, it was a contradiction in terms to say that there was no break in the chain of evidence when in fact there exists material discrepancy as to the weight of the drug exhibit. (Para 16)

A [16] Coming back to the present case, unlike the case of *Zaifull Muhammad, it is true that there is only one material discrepancy as to the gross weight of the drugs exhibits. In our judgment, even though there existed only one material discrepancy in the present case as found by the police and the chemist, which was left unexplained, this created a reasonable doubt as to the identity of the drugs exhibits* in question. Under such circumstances, as made clear by the
B learned Chief Justice, "it is a contradiction in terms, to say that there is no break in the chain of evidence, when in fact there exists material discrepancy as to the weight of the drug exhibit". This extract from the judgment of the learned Chief Justice is very significant principle of law to follow. It is also important to note that the Federal Court in *Zaifull Muhammad* referred to the case of *Loh Kah Loon v. PP* but prefers the
C reasoning in both *Yeong Kia Heng lwn. PP* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 and *Tan Yew Choy v. PP* [2009] 4 CLJ 245. The *ratio decidendi* laid down in *Zaifull Muhammad* is that an accused person is entitled to any benefit of reasonable doubt from any material discrepancy, which goes to the identity of the drugs exhibits that is left unexplained. Indeed, the
D dangerous drugs itself (ketamine and nimetazepam in this instant case), constitutes the very *corpus delicti* of the offence and in sustaining a conviction under s. 39B(2) of the DDA, the identity and integrity of the *corpus delicti* must be established beyond reasonable doubt. It is pertinent to note that a unique characteristic of dangerous drugs is that they are not readily identifiable as in fact they are subject to scientific analysis by
E the chemist to determine their composition and nature. Therefore, a standard more stringent than that applied to cases involving objects which are readily identifiable must be applied. Where there is a material discrepancy in the weight of the drug exhibit as found by the police and the chemist, it is incumbent on the prosecution to explain such discrepancy satisfactorily. Affirmative evidence is required to dispel any
F lingering or remaining reasonable doubt on the identity of the drugs exhibits. The absence of a reasonable explanation would give rise to a reasonable doubt on the identity of the drugs exhibits. This point has already been made earlier but deserved to be reiterated. Undeniably, *Zaifull Muhammad* is the latest Federal Court decision on the issue of identity of drugs exhibits. It represents the law on this subject as we apply
G today. In this way, the learned DPP's arguments did not overcome the difficulty in the face of the case of *Zaifull Muhammad*. (emphasis added)

[32] In the case of *Ooi Choo Hock v. PP* [2014] 3 CLJ 239, Abdul Malik Ishak JCA, in delivering the judgment of the court, held that:

H (4) There were discrepancies with regard to, *inter alia*, the number of pills seized and the gross weight of the drugs. The discrepancies with regard to the drug exhibits were so serious that they strike at the very core of the prosecution's case. The prosecution ventured no explanation for the various discrepancies highlighted. With these inherent discrepancies, there was no (*prima facie* case and the defence should not have been
I called.

(See also: *Zaifull Muhammad v. PP & Another Appeal* [2013] 2 CLJ 383; [2013] 2 MLJ 348 (FC); *PP lwn. Bazleh Saeid Salleh & Satu Lagi* [2014] 6 CLJ 979 (CA); *Yusri Pialmi v. PP* [2010] 6 CLJ 878 (FC)). A

[33] Based on the above-cited cases, we are of the view that, in the circumstance of this case, it is incumbent on the prosecution to offer some explanation for the discrepancies. With the discrepancies between the weights of the drug in the fakta kes (P1(d)) and the weights of the impugned drug in P4 left unexplained, this created reasonable doubt as to the identity of the drugs exhibits which form the subject matter of the charge against the respondent. B

[34] It is probable that the difference of 133g (1,944g minus 1,811g) between the weight as stated in P1(d) and the weight as stated in P4 (1,811g) is the weight of the impugned drugs including the packaging of the impugned drugs. In any event, the "Jumlah keseluruhan bungkusan yang disyaki mengandungi dadah adalah lapan bungkus. Setelah ditimbang, berat kasar keseluruhan adalah dalam anggaran seberat 1,944g" as stated in P1(d) was never explained in the prosecution's case by the witnesses. On the weight of 1,811g as stated in P4, even though PW1 testified that the weight of 1,811g is the net weight of the impugned drugs, the gross weight of the impugned drugs was not stated in any evidence of the said PW1 despite her evidence that she had taken the gross weight of the impugned drugs. No weight of the packaging of the impugned drugs was also stated in any of the said PW1's evidence before the court. C D E

[35] For the above reason, we found that there is no appealable error in the learned judge's decision in giving an order to acquit and discharge to the respondent. F

[36] In addition, we also agreed with the respondent's submission that there is doubt as to the identity of the impugned drugs based on the conduct of the TruNarc test as put forward by the respondent at the close of the prosecution's case. The issue relating to the conduct of the TruNarc test as submitted can be simplified as follows: G

(i) Firstly, there are photographs in the memory card, P29 which the prosecution omitted from producing as evidence in court. We agreed, this is a clear suppression and withholding of evidence as this was only discovered after the learned judge instructed for the photographs in the memory card, P29 to be viewed in the court. H

(ii) The photograph that was not produced by the prosecution includes photograph 1 showing TruNarc test kit (file reference number DCSN2712.jpg). According to PW3, the said photograph was not produced to the court on the instruction of PW7 (pp. 160 to 161, record I

of appeal, vol. 2(1)) and this was admitted by PW7 herself (see p. 272, record of appeal, vol. 2(2). When cross-examined on the said photograph 1 showing the TruNarc test kit, PW3 testified as follows:

Q674: PUT: – Photograph DCSN2702. Jpg clearly shows that the TRUNARCH test was taken on 23.4.2017 at 8:03, do you agree?

A: Yes I agree

[37] It was not disputed that the respondent arrived at the Kuching International Airport on 23 April 2017 at around 2100 hours whereas the result of the TruNarc test purportedly conducted by Pik Timothy Jackie ak. Biscop shows that it was carried out 23 April 2017 at 8:03 as evidence in the photograph 1 showing TruNarc test kit (file reference number DCSN2712.jpg) (see p. 161 of the record of appeal vol. 291)). The result of the TruNarc test shown in the said file reference raises the immediate question, how can the purported drugs be tested by Pik Timothy Jackie ak. Biscop even prior to the respondent's arrival in Kuching? Pik Timothy Jackie ak. Biscop was the custom officer who conducted the TruNarc test on the impugned drugs purportedly recovered from the respondent on 23 April 2017 at around 2300 hours but he was never called by the prosecution to explain the discrepancy.

[38] Based on this evidence, we agreed with the respondent that there was a total failure by the prosecution to explain this key discrepancy in the chain of evidence. We also agreed with the respondent that because of the failure of the prosecution to call Pik Timothy Jackie ak. Biscop, the learned judge should have invoked the adverse inference under s. 114(g) of the Evidence Act 1950.

[39] It is our view that this serious discrepancy together with the prosecution's failure to explain how the gross weight of the purported drugs of 1,944g was taken and why it differed from the net weight of 1,811g taken by PW1 cast a serious doubt on the identity of the drugs seized. As such, we found the findings of the learned judge on this issue are justified and there is no reason for us to disturb the findings of the learned judge.

Conclusion

[40] For all the reasons above-stated, we hold that the decision of the learned judge in giving order to acquit and discharge without calling defence to the respondent was correct. Therefore, it is our unanimous decision that the prosecution's appeal be dismissed.